In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1616

ROGER M. MADDEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On September 10, 1973, petitioner entered a plea of guilty to the fifth count of a 13-count information charging him with failing to file certain employers' quarterly federal tax returns, in violation of Section 7203 of the Internal Revenue Code of 1954, 26 U.S.C. 7203. The court of appeals affirmed (Pet. App.).[1] The judgment of the court below was entered on March 27, 1974 (Pet. App. A-1). The petition for a writ of certiorari was not filed until April 29, 1974, and was therefore untimely under Rule 22(2) of the Rules of this Court. There is, in any event, no reason to grant the writ.

Petitioner's sole contention is that the criminal statute under which he was charged and convicted (26 U.S.C. 7203)

---

[1]The court of appeals did not consider the effect of petitioner's guilty plea on his right of appeal, since he had been assured by the United States Attorney that, despite his plea, he could appeal for the purpose of challenging the constitutionality of the statutes under which he was convicted (Pet. App. A-2).

is unconstitutional as applied to him in that it deprives him of liberty and property and imposes involuntary servitude upon him in violation of the Fifth and Thirteenth Amendments, because it requires him to become a bookkeeper and tax collector in violation of those provisions. The argument, for which petitioner cites no authority, is wholly without merit.[2] As the court of appeals held, although the provisions that petitioner challenges have not been the subject of constitutional attack, "decisions dealing with similar statutes, * * * by analogy, require rejection of [petitioner's] contention" (Pet. App. A-3).

Over 50 years ago, this Court upheld the constitutionality of the Revenue Act of 1913 (imposing an income tax) against the challenge that the provisions making it the duty of corporations to retain and pay the tax on interest due on bonds, because of the cost to which corporations were subjected, was repugnant to due process of law as an illegal taking of corporate property. *Brushaber* v. *Union Pacific R.R.*, 240 U.S. 1, 21-26. See, also, *California Bankers Assn.* v. *Shultz*, No. 72-985, decided April 1, 1974, slip op. 22. Similarly, the Acts imposing taxes for old age benefits upon employees and employers have been upheld against constitutional challenge. *Helvering* v. *Davis*, 301 U.S. 619. See *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (constitutionality of Acts imposing unemployment compensation taxes upheld).

The provisions of law requiring employers to withhold and pay over employment taxes to the federal government, contrary to petitioner's contention (Pet. 6-7), do not subject them to involuntary servitude. *Abney* v. *Campbell*, 206 F. 2d 836, 841 (C.A. 5), certiorari denied, 346 U.S. 924; *Porth* v. *Brodrick*, 214 F. 2d 925, 926 (C.A. 10). The power

---

[2]As the court below pointed out (Pet. App. A-2), Section 7203 is merely a penalty provision, and petitioner's attack should have been directed at the relevant provisions of the Internal Revenue Code that impose duties upon employers, *viz.*, Sections 3102, 3402, and 6051 of Title 26.

to collect taxes necessarily implies the power to establish the means for collection and payment. Cf. *Kellems* v. *United States*, 97 F. Supp. 681 (D. Conn.).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1974.

DOJ-1974-08